

ORIGINALISM AND THE PROBLEM OF FUNDAMENTAL FAIRNESS

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I. THE PROMINENCE OF ORIGINALISM

Originalism is a prominent way of interpreting the Constitution and of deciding constitutional cases. As we shall see, there are a number of ways to develop the basic idea of originalism. We can begin with almost any formulation of the basic idea. Thus the constitutional historian Jack Rakove suggests, for example, that “advocates of *originalism* argue that the meaning of the Constitution (or of its individual clauses) was fixed at the moment of its adoption, and that the task of interpretation is accordingly to ascertain that meaning and apply it to the issue at hand.”¹ For reasons we shall develop, however, originalism rests on fundamental unfairness, and should in crucial contexts be deemed morally unacceptable as a basic approach to constitutional decision making.

Originalism is today arguably dominant as a theory, if not in actual judicial practice. There are certainly dissenters from this belief in originalism’s dominance, including some originalists. Robert Bork, for example, writing in 1990, argued that “[w]hat was once the dominant view of constitutional law—that a judge is to apply the Constitution according to the principles intended by those who ratified the document—is now very much out of favor among the theorists of the field.”² Several years later, Professor Jonathan Macey concluded that “[o]utside the comfortable confines of the Federalist Society, originalism is far from fashionable. . . . As Robert Bork discovered at his confirmation hearings, those who are originalists lack intellectual respectability.”³

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1. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* xiii (1996) (posing the question of “[w]hat authority should [the Constitution’s] ‘original meaning’ (or ‘original intention’ or ‘understanding’) enjoy in its ongoing interpretation?”).

2. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143 (1990).

3. Jonathan R. Macey, *Originalism as an “Ism,”* 19 HARV. J.L. & PUB. POL’Y 301, 301

But the intellectual tides have arguably lifted originalism not only to prominence, but even to dominance. Thus the widely respected constitutional theorist Michael Perry has declared that “[a]s between the originalist approach to the interpretation of the constitutional text and any nonoriginalist approach, the originalist approach is the proper one.”⁴ Surveying the landscape, Professor Randy Barnett has concluded that originalism “has thrived like no other approach to interpretation.”⁵ Even more emphatically, it has been argued that “originalism has become authoritative, both inside and outside of courts.”⁶ Similarly, it has been held that “originalism is the legal profession’s orthodox mode of justification.”⁷ And on another assessment, “[o]riginalism has become the prevailing approach to constitutional interpretation.”⁸ Or even more dramatically, “[t]he only jurisprudence that has made it into the public sphere is . . . originalism.”⁹

In part, this reflects a broadening of the idea of originalism, so that the title of “originalist” can be more widely adopted.¹⁰ It is thus suggested that “[w]e are all originalists now.”¹¹ In at least a broadly

(1996); see also Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 32 (2004) (“[O]riginalism in any form . . . holds little attraction for some Justices and many academic commentators.”).

4. Michael J. Perry, Brown, Bolling, & *Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 S. ILL. U. L.J. 53, 54 (1995).

5. Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 257 (2005) [hereinafter *Trumping Precedent*]; see also Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999) (“Originalism . . . has virtually triumphed over its rivals. Originalism is now the prevailing approach to constitutional interpretation.”).

6. Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 550 (2006).

7. Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL’Y 283, 287 (1996) (quoting noted Seventh Circuit Judge Richard Posner, *OVERCOMING LAW* 245 (1995)).

8. Troy L. Boomer, *Putting Meaning in Its Place: Originalism and Philosophy of Language*, 25 L. & PHIL. 387, 387 (2006).

9. Keith E. Whittington, *Let’s Call the Whole Thing Off?*, 22 CONST. COMMENT. 365, 365 (2005) (quoting UCLA Law Professor Clyde Spillenger, *quoted in* Jess Bravin, *Change on the Supreme Court*, WALL ST. J., July 5, 2005, at A4) (omission in original).

10. See Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. (forthcoming), available at <http://ssrn.com/abstract=952384> (“It certainly seems like the originalists are winning. Professor Jack Balkin—finding that he couldn’t beat ‘em—joined them.”); Akhil Reed Amar, *Rethinking Originalism: Original Intent for Liberals (and for Conservatives and Moderates, Too)*, SLATE, Sept. 21, 2005, <http://www.slate.com/id/2126680>.

11. Laurence H. Tribe, *Comment to ANTONIN SCALIA, A MATTER OF INTERPRETATION* 65, 67 (Amy Gutmann ed., 1997); see also Ronald Dworkin, *Comment to ANTONIN SCALIA, A MATTER OF INTERPRETATION* 115, 119–21 (Amy Gutmann ed., 1997);

inclusive sense of the term, originalism as a theory indeed seems well-established, if not utterly dominant.

We will make no attempt to account for the current popularity of originalism, beyond making one modest point: In matters of authority and legitimacy, a sense of tradition and continuity have a role to play. Originalism, in emphasizing reference to the historical document and the meaning or intentions of famous Framers, can evoke emotional responses that alternatives to originalism cannot directly match.

In this context, we may think of Walter Bagehot's classic distinction between the "dignified parts"¹² and the "efficient parts"¹³ of the institution of the English Constitution. Bagehot thought that the "dignified" elements of the Constitution tended to "excite and preserve the reverence of the population,"¹⁴ a necessary condition to the exercise of authority.¹⁵ Our Constitution and the Framers tend to evoke in many persons something of this reaction.

More recently, the sociologists Edward Shils and Michael Young developed this theme in noting that the British monarchy had "its roots in man's beliefs and sentiments about what he regards as sacred."¹⁶ As Shils and Young argue with regard to the Crown,¹⁷ so, to a degree, for American constitutionalism. Legitimacy and authority, in a behavioral sense, are arguably enhanced where criticism is directed not at the Constitution or the Framers, but against particular court decisions, particular judges, particular court compositions, or even a particular court. Recognizing the emotional importance to many of the

Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 607 (2004) ("If 'we are all interpretivists' . . . , then we may all also be originalists."); Legal Theory Lexicon, http://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_1.html (Jan. 18, 2004) ("These days one is more likely to hear pronouncements that 'we are all originalists, now.'") For some meaningful qualification of this phrase, see Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495, 495 (1996) ("[A]t some suitably abstract level almost everyone is an originalist in at least some limited sense.") (citing Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 313-14 (1996) (discussing an appropriately supplemented "soft" or generalized originalism as distinct from nonoriginalism)).

12. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 7 (Miles Taylor ed., Oxford Univ. Press 2001) (1867) (emphasis omitted).

13. *Id.* (emphasis omitted).

14. *Id.*

15. *See id.*

16. Edward Shils & Michael Young, *The Meaning of the Coronation*, in EDWARD SHILS, CENTER AND PERIPHERY: ESSAYS IN MACROSOCIOLOGY 135, 136 (1975) (revised version of Edward Shils & Michael Young, *The Meaning of the Coronation*, 1 SOC. REV. 63 (1956)).

17. *See id.* at 148.

constitutional text and of the Framers allows us to avoid a narrowly rationalistic view of legitimacy and authority in practice.¹⁸ The emotional and symbolic dimensions of originalism may thus help account for its popularity as the adoption of the Constitution recedes in time.

II. SOME SPECIFIC FORMS OF ORIGINALISM

It is in any event fair to concede the current popularity, if not the dominance, of originalism as a theory of constitutional interpretation. Before we can evaluate originalism on the merits, though, we should further¹⁹ clarify the range of meanings of originalism itself.

To some extent, the merits of originalism may depend upon some much more general theory of interpretation. On the theory of interpretation of texts in general, however, we shall say little.²⁰ However

18. For diverse warnings against an unduly narrow conception of reason in government and law, see EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 96–97 (L.G. Mitchell ed., Oxford Univ. Press 1999) (1790); MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 22–43 (1964); MICHAEL OAKESHOTT, RATIONALISM IN POLITICS (1962); DAVID HUME, *Of the Original Contract*, in POLITICAL WRITINGS 164 (Stuart D. Warner & Donald W. Livingston eds., 1994) (1748); see also JAROSLAV PELIKAN, INTERPRETING THE BIBLE AND THE CONSTITUTION 76–78 (2004).

19. For our beginning at such an understanding, see *supra* text accompanying note 1.

20. Meaning, we shall assume for the sake of making progress, is not entirely subjective. See TERRY EAGLETON, THE MEANING OF LIFE 124 (2007) (“Meaning . . . is something people do; but they do it in dialogue with a determinate world whose laws they did not invent, and if their meanings are to be valid, they must respect this world’s grain and texture.”); see also TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 64 (2d ed. 1996) (“There is in fact no reason why the author should not have had several mutually contradictory intentions, or why his intention may not have been somehow self-contradictory . . .”).

The noted literary theorist, semiotician, and novelist Umberto Eco has interestingly opined that

[o]n one side it is assumed that to interpret a text means to find out the meaning intended by its original author or—in any case—its objective nature or essence, an essence which, as such, is independent of our interpretation. On the other side it is assumed that texts can be interpreted in infinite ways.

Taken as such, these two options are both instances of epistemological fanaticism.

UMBERTO ECO, THE LIMITS OF INTERPRETATION 24 (1990); see UMBERTO ECO, THE ROLE OF THE READER: EXPLORATIONS IN THE SEMIOTICS OF TEXTS 15 (1979) (describing “text [as] a network of different messages depending on different codes and working at different levels of signification”) (emphasis omitted); see also E.D. HIRSCH, JR., THE AIMS OF INTERPRETATION (1976); E.D. HIRSCH, JR., VALIDITY IN INTERPRETATION 124–25 (1967) (on law in general and the interpretation thereof). On “meaning” itself, see C.K. OGDEN & I.A. RICHARDS, THE MEANING OF MEANING 186–87 (1923) (listing a variety of recognizable

much the Constitution may share with a novel, a poem, a sacred scripture, a ransom note, a blueprint, a limerick, or a laundry list, there are other features, perhaps unshared with the above texts, on which we may profitably concentrate.

Originalism, we have already seen, comes in different strengths and flavors.²¹ We can elaborate on our introductory formulation²² by invoking an exemplary originalist, Professor Raoul Berger. Professor Berger reported that “I understand by original intention, the explanation that draftsmen gave of what their words were designed to accomplish, what their words mean.”²³

This formulation is controversial in its reference to drafters, rather than to the ratifiers, of the proposed Constitution.²⁴ At least as importantly, Professor Berger apparently draws no important distinctions here among “original intention,” “original meaning,” and “original understanding.”²⁵ Of late, some originalists have seen an important distinction between a more subjective original “intention” and a more objective or more cultural original “meaning.”²⁶

Cutting across this latter distinction, according to Professor Ronald

meanings of “meaning”). On the meanings of “ambiguity,” see WILLIAM EMPSON, *SEVEN TYPES OF AMBIGUITIES* 5–6 (1930). Applying broad literary theory to the Constitution, see Stanley Fish, *Intentional Neglect*, N.Y. TIMES, July 19, 2005, at A21 (“[T]he only coherent answer to the question ‘What does the Constitution mean?’ is that the Constitution means what its authors intended it to mean. The alternative answers just don’t work: the Constitution can’t mean what the text alone says because there is no text alone; and it can’t mean what present-day society needs and wants it to mean because any meaning arrived at under that imperative will not be the Constitution’s.”). Professor Fish’s dichotomy, however, may not be exhaustive, as Ogden and Richards seem to suggest. OGDEN & RICHARDS, *supra*, at 195 (“[W]e very often mean what we do not mean; *i.e.*, we refer to what we do not intend . . .”).

21. See Levinson, *supra* note 11, at 495–96; Cass R. Sunstein, *supra* note 11, at 312 (1996).

22. See *supra* text accompanying note 1.

23. Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 350–51 (1988).

24. See, e.g., BORK, *supra* note 2, at 143 (referring specifically to “those who ratified the document”); Barnett, *An Originalism for Nonoriginalists*, *supra* note 5, at 620.

25. See Johnathan G. O’Neill, *Raoul Berger and the Restoration of Originalism*, 96 NW. U. L. REV. 253, 255 (2001). Whether genuinely consistent with his originalism or not, Professor Berger also disdained any appeal to natural rights or natural law in constitutional interpretation. See *id.* at 255–56.

26. See, e.g., Barnett, *An Originalism for Nonoriginalists*, *supra* note 5, at 620 (citing Robert Bork and Justice Antonin Scalia, among others); Barnett, *Trumping Precedent*, *supra* note 5, at 257 (discussing “original intentions” versus emphasis on “original public meaning of the text”).

Dworkin, is a further distinction between “‘semantic’ originalism,”²⁷ which focuses on what was intended to be said,²⁸ and “‘expectation’ originalism,”²⁹ which focuses on the expected consequences of the language in practice.³⁰ It goes without saying, for example, that we sometimes fail to grasp all of the meaning and practical implications of our own language.³¹

This is not to suggest that all forms of originalism must focus narrowly on something like “meaning.” It is suggested, for example, that even some originalists may want to consider “principles of political morality, prudence, doctrine, [and] rule of law considerations,”³² in a subordinate way, in seeking constitutional meaning. At the very least, originalists of the public-meaning variety will typically want to have access not only to (historic) dictionaries,³³ but to the conventions of ordinary English communication,³⁴ and to the canons and conventions of legal meaning³⁵ as well. Originalists, finally, may also “acknowledge that the original understanding of some clauses could be fairly read to have included a background assumption of further judicial development.”³⁶

All of these considerations add to the difficulty of reducing all forms of originalism to a concise slogan, but they also enrich originalism and add to the resources available to originalists in responding to some traditional criticisms³⁷ of originalism.

27. Dworkin, *supra* note 11, at 119; see also Keith E. Whittington, *Dworkin's “Originalism”: The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 204 (2000).

28. See Dworkin, *supra* note 11, at 119.

29. *Id.*

30. See *id.*

31. There is, for example, nothing in the public, semantic meaning of “the equal protection of the laws” that confines its application either to a particular race or to race in general, whatever anyone’s expectations may have been in adopting the Fourteenth Amendment.

32. Leib, *supra* note 10; see also Randy E. Barnett, *Underlying Principles* (forthcoming) (manuscript at 9), available at <http://ssrn.com/abstract=954601> (endorsing recourse to “underlying principles,” but only for the sake of properly applying “the original meaning of the text interpreted in light of these principles” to present circumstances).

33. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 519 (2003).

34. See *id.*

35. See *id.* at 519–20.

36. Monaghan, *supra* note 3, at 38.

37. For brief listings of some standard criticisms of originalism, see ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 2–4 (2001); Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL RTS. J. 57, 74 (2004); Randy E. Barnett, *Scalia's Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 8

III. ORIGINALISM AND HISTORICAL TAINTEDNESS

The developments sketched above allow for a variety of forms of originalism. But such developments cannot avoid crucial problems that inhere in any authentic version of originalism. Originalism is inescapably and crucially tainted as a normative theory. This essential taintedness will admittedly not be evident in the context of many constitutional questions. But there are, as well, matters of fundamental importance to constitutional jurisprudence where the taintedness of originalist theory is crucially relevant and ineradicable. The historical circumstances on which any standard³⁸ of originalism relies are themselves tainted in such a way as to disqualify originalism as a primary method of constitutional interpretation in vital legal contexts.

The taintedness of the history on which originalism relies is well known. In adopting the Constitution, the actual majority of American adults constituted “a majority that never was.”³⁹ We all recognize that “a majority of adults—women, non-whites, and some white males—... were excluded from active participation in making [the] laws, whether directly or through their elected representatives.”⁴⁰ With regard to the Constitution and its adoption, “[t]he majority of the population—women, slaves, free blacks, persons without substantial property—had no voice in ordaining the Constitution.”⁴¹ In the aggregate, “[t]he Constitution received far from overwhelming consent even from those who participated or were eligible to participate, much less from the

(2006).

38. This qualification is meant to address two closely related possibilities. First, any theory can be so diluted, or so extensively incorporate crucial elements of rival theories, that only the name, rather than the substance, of the original theory remains. To the extent that an originalist is willing to dilute, if not abandon, what is distinctive about originalism, the originalist may fare better with critics, but at the cost of conceding the substance of the debate.

Second, and as a particular instance of the first, one could, technically, adopt an ahistorical, merely hypothetical form of originalism, focusing on idealized circumstances, events, and agreements. This approach could minimize what we refer to as the problem of tainted history. But it would be originalism in only a nominal sense. In substance, such a merely hypothetical originalism might more closely resemble the development by John Rawls of hypothetical agreements from his original position, transferred to a constitutional context. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971). Whatever the merits of such a theory, it would not most usefully be classified as a form of genuine originalism.

39. Jack N. Rakove, Book Review, 14 J. INTERDISC. HIST. 184, 184 (1983) (reviewing and quoting JAMES MACGREGOR BURNS, *THE VINEYARD OF LIBERTY* 383 (1982)).

40. Robert A. Dahl, *On Removing Certain Impediments to Democracy in the United States*, 92 POL. SCI. Q. 1, 5 (1977).

41. Louis Henkin, *The United States Constitution as Social Compact*, 131 PROC. AM. PHIL. SOC'Y 261, 263 (1987).

eighty percent of the population that was ineligible.”⁴²

Our focus is not on details or on bare percentages. Our focus is instead on the intended virtual exclusion from any meaningful role in the constitutional adoption process of significant identified groups with basic interests at stake.⁴³ This systematic virtual exclusion was intended to have particular results and, in any event, has systematically skewed constitutional law over time.

Of course, most of the excluded groups were at various later points incorporated into the electoral process. But by then, the basic nature and substance of the Constitution had been established. A late enfranchisement does not undo history. The ripples on the pond continue to radiate outward. A powerful bias, if not a realistic irreversibility, still obtains. A judicial precedent is only the most formal manifestation of this developing bias. American constitutional history, and our present constitutional law, are, as we shall briefly suggest, what is called “path-dependent.”⁴⁴ These exclusions, the systematic skewing and the path-dependency, jointly raise serious questions of constitutional legitimacy in important contexts.

In this light, we must recognize originalism as relying on and maintaining, rather than solving, the problem of constitutional legitimacy. Originalism is actually part of the problem. We can make progress on the problem of constitutional legitimacy not by adhering to originalism, but only by adopting some alternative that better addresses the systematically exclusionary history crucial to constitutional originalism.⁴⁵

Consider specifically that while specific franchise rules varied from colony to colony, generally, “‘the people’ included only those adult

42. Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482, 1498 (1985); see also *id.* at 1498 n.44 (“[R]oughly 2.5% of the population voted in favor in the Constitution’s ratification.”); Alex Kozinski & Harry Susman, *Original Mean[der]ings*, 49 STAN. L. REV. 1583, 1590 n.55 (1997) (citing Simon, *supra*).

43. While we will not press too closely into details of legitimacy, we should also not attach undue significance to the influence, for example, of even particular women such as Mercy Otis Warren, who after all was an Anti-Federalist. See generally LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* 80–85 (1980).

44. See *infra* notes 72–75 and accompanying text. The popular idea of the “butterfly effect” in changing the weather over time is a more extreme case. See *infra* note 185.

45. Many of the problems of negotiation, bargaining strength, strategy, super-majoritarianism, and priorities are common to most approaches to constitutional interpretation.

males who possessed certain amounts and kinds of property.”⁴⁶ In some colonies, perhaps a £50.00 freehold of twenty-five to one hundred acres would suffice.⁴⁷ These and similar limitations were clearly intended to reduce the potential scope of the franchise in important and systematic ways.

The various racial, gender, and property-holding or class status limitations supposedly aimed at reducing electoral irresponsibility.⁴⁸ But irresponsibility here quickly loses its status as a neutral criterion, and instead suggests bias and important conflicts in vision and interest.

In particular, it was assumed by the well-off that those with little property, lacking independence of means,⁴⁹ would lack also a meaningful stake in society⁵⁰ and would therefore tend toward electoral irresponsibility.⁵¹ More specifically, it was feared, those without an economic stake in society would be drawn toward economic “leveling” and redistribution.⁵²

Differences along these lines cannot be neutrally resolved by labeling ideological opponents as too irresponsible to vote. Given this and other forms of systematic exclusion from the drafting and ratifying of the Constitution, it is not surprising that the Constitution became “an aristocratic document designed to curb the democratic excesses of the Revolution.”⁵³ Nor is it surprising that the Framers anticipated that the composition of Congress would largely mirror the general franchise requirements.⁵⁴

46. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 25 (1985).

47. *See id.* at 26.

48. *See id.*

49. *See id.*

50. *See id.* One might imagine that the greater a person’s economic dependence on others, whether for charitable alms or modest wages, the greater their stake in the society’s economic productivity and security. Perhaps those with the greatest wealth would also tend to have the greatest independence, including international mobility. But our point is not to critique the Framers’ theory of the franchise, constitutional or otherwise.

51. *See id.*

52. *See id.* See also the underlying conflict of visions in the poll tax case of *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966) (rejecting wealth, property, or ability to pay as a legitimate limitation on the franchise).

53. See Shlomo Slonim, *Motives at Philadelphia, 1787: Gordon Wood’s Neo-Beardian Thesis Reexamined*, 16 LAW & HIST. REV. 527, 528 (1998) (quoting GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 626 (1969)).

54. See Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2394 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)) (citing THE FEDERALIST NO. 35, at 216 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

Our point does not address any differences in interests or voting patterns among substantial property owners.⁵⁵ We instead focus on the general exclusion of free and enslaved blacks, women, and those white males falling below some specified property minimum. These sorts of exclusions would of course be morally objectionable in themselves, even if the exclusions had no effect on the text and development of the Constitution itself. The moral bindingness, legitimacy, and authority of the Constitution, at least in certain crucial respects, could on this basis alone be called into question.

But it is also important to think through possible consequences of these exclusions for constitutional law, as enshrined in the text and in the resulting interpretive case law. It is impossible to reconstruct with certainty what would have happened constitutionally given a much more inclusive group of constitutional drafters and ratifiers. Even if we assume that one purpose of the exclusions was to discourage "irresponsible"⁵⁶ redistribution, we have nevertheless thereby opened the door to the idea that the influence of the excluded groups would have made some generally predictable difference, along economic lines.

If the systematically excluded had enjoyed some meaningful say in the drafting and ratification of the Constitution, they perhaps would have attended to their most basic interests, including their most basic economic and survival interests. This is not to guess at the bargaining strength that the already economically disadvantaged would have been able to exercise.⁵⁷ But any coercion or duress by the relatively well-off in the course of articulating and bargaining over constitutional provisions could certainly impeach the moral legitimacy of any resulting constitution.⁵⁸

55. Compare the debate over Charles Beard's particularized economic analysis of the Constitution, as referred to in, for example, Shlomo Slonim, *supra* note 53, at 527, with FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* 349 (1958), Neil K. Komisar, *Paths of Influence—Beard Revisited*, 56 GEO. WASH. L. REV. 124, 124–25 (1987), and Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50, 51–52 (1987) (addressing CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913)).

56. See McDONALD, *supra* note 46, at 26.

57. For general theoretical discussion, see, for example, JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN* (1975); DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986); JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* (1986); *CONTRACTARIANISM AND RATIONAL CHOICE: ESSAYS ON DAVID GAUTHIER'S MORALS BY AGREEMENT* (Peter Vallentyne ed., 1991). For a much more heavily qualified contractarianism, see RAWLS, *supra* note 38.

58. For the voidability even under positive law of contracts obtained through economic duress, coercion, or overreaching, see, for example, *Cabot Corp. v. AVX Corp.*, 863 N.E.2d

It is also possible that no constitution inattentive to the basic economic and survival interests of the excluded would have been ratified by a more inclusive group of ratifiers. And there is no reason to suppose that if the disenfranchised had been allowed free and equal scope for participation, they would have ignored their basic interests across the board, focusing entirely on less crucial matters.⁵⁹

Even today we see significant differences on basic economic and welfare policy along lines paralleling the group exclusions from the constitutional adoption process. Merely for example, the frequently encountered “gender gap”⁶⁰ on social welfare policy⁶¹ has been widely discussed.⁶² Significant racial differences on employment and welfare policy are also well established.⁶³ Much of the logic of these policy differences, as in the case of enslaved and freed blacks, would seem to translate to the historical circumstances of both the constitutional founding and the ratification of the Civil War Amendments.⁶⁴

It seems clear that the constitutional adoption process was dramatically skewed to promote not just the neutral quality and

503, 511 (2007) (citing *Barnette v. Wells Fargo Nev. Nat'l Bank*, 270 U.S. 438, 444 (1926); *Int'l Underwater Contractors v. New England Tel. & Tel. Co.*, 393 N.E.2d 968, 970 (Mass. App. Ct. 1979)).

59. While a constitution at the national level must provide for structural matters where the resolution can be arbitrary within limits, as in the specified ages of elected officials, we may assume that the excluded groups would have noticed their own relevant basic interests, whatever their degree of altruism, as much as did those actually enfranchised. The Tenth Federalist Paper focuses on group interest as a political motivator. See *THE FEDERALIST NO. 10* (James Madison). Much of this general logic seems to be shared by the majority and the minority in the later poll tax case of *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

60. See, e.g., Kristi Andersen, *The Gender Gap and Experiences with the Welfare State*, 32 PS: POL. SCI. & POL. 17, 17 (1999).

61. See *id.*

62. See *id.* (citing, e.g., *THE POLITICS OF THE GENDER GAP: THE SOCIAL CONSTRUCTION OF POLITICAL INFLUENCE* (Carol M. Mueller ed., 1987)). For a recent popular argument for a direct causal relationship between the extension of women's suffrage and the expansion of federal government social welfare spending as a percentage of the economy, see JOHN R. LOTT, JR., *FREEDOMNOMICS: WHY THE FREE MARKET WORKS AND OTHER HALF-BAKED THEORIES DON'T* 160–65 (2007). For further detail, see Robert Y. Shapiro & Harpreet Mahajan, *Gender Differences in Policy Preferences: A Summary of Trends from the 1960s to the 1980s*, 50 PUB. OPINION Q. 42, 44–45, 51 (1986).

63. See, e.g., ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* 178–79 (1980); WARREN E. MILLER & J. MERRILL SHANKS, *THE NEW AMERICAN VOTER* 368–69 (1996). This is not to suggest that the effects of race and economic class are easily disentangled. See ROBERT C. SMITH & RICHARD SELTZER, *RACE, CLASS, AND CULTURE* (1992).

64. See U.S. CONST. amends. XIII–XV; AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 89 (2005); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

integrity of the process, but particular group interests and preferences as well. This impeaches the supposed neutrality and fairness of the adoption process and the adopted Constitution. Since originalism as a theory of constitutional interpretation relies especially heavily on this systematically skewed, exclusionary process, originalism inherits the taintedness of the underlying history.

IV. DOES TIME DISPEL THE HISTORICAL TAINT?

Is the taintedness of history that is inherited by originalism washed out, however, by the possibility of later constitutional amendment or even by ordinary statute? All of the originally excluded groups referred to above have by now been granted the power to vote. Does the possibility of new constitutional amendments and statutes undo the objectionable history upon which originalism distinctively relies?

This argument is made by the originalist Robert Bork in the following terms:

The dead, and unrepresentative, men who enacted our Bill of Rights and the Civil War amendments did not thereby forbid us, the living, to add new freedoms. We remain entirely free to create all the additional freedoms we want by constitutional amendment or by simple legislation⁶⁵

The argument thus seems to be that whatever fundamental illegitimacies may have tainted the original Constitution can be readily neutralized, and thereby remedied.

Professor Bork's analysis, however, understates the realistic difficulties involved in obtaining majority recognition for minority rights. It is doubtless impossible to tell what precise constitutional text, if any, would have resulted from an inclusive constitutional ratification process that required fair bargaining and some form of supermajority for adoption.⁶⁶ It is also impossible to tell whether today's amendment processes⁶⁷ are more or less demanding in one sense or another than the

65. BORK, *supra* note 2, at 171.

66. For discussion of the original ratification requirements, see, for example, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 105-09 (reprint ed., 1987) (nine state convention votes required for ratification pursuant to U.S. CONST. art. VII).

67. For several amendment routes, all requiring supermajorities at more than one stage, see U.S. CONST. art. V. For a broad theoretical discussion, see RESPONDING TO

original ratification vote.

What Professor Bork's analysis most underemphasizes, however, is the combination of the difficulty at any point of obtaining supermajority support for legitimate minority interests, along with the rather delicate "path-dependency" of American constitutional history. If there were indeed a miraculous "reset" button controlling the nature and scope of recognized constitutional rights, persistent minorities of various kinds would be generally last to have access to that reset button.

More importantly, though, there simply is no such reset button. American constitutional history cannot be readily erased and re-run. Some events can be atoned for, but not readily undone, with their effects then somehow rapidly and entirely dissipated. Some events, including basic injustices, have consequences that tend to persist, and to directly, indirectly, and even unrecognizedly influence the future.

In general, the Constitution as adopted, with no influence from the excluded groups, becomes the baseline. Any amendments from that baseline require multiple supermajorities.⁶⁸ The Constitution, even insofar as it can be said to be morally tainted, gradually accrues additional sociological legitimacy in the sense of unchallenged status and in terms of cultural symbolism.⁶⁹ Thus it is said that "the drafting, ratification, and amendment of the 1787-89 Constitution continue to be seen as events that express the will of a properly empowered American 'people' to set and define the character and limits of the polity."⁷⁰ At a more personalized level, "[t]he constitutional Founders still seem to enjoy a regard, if not reverence, that has not significantly diminished over time."⁷¹

Despite Professor Bork's suggestions, a minority that seeks to even partially redress basic injustices through a constitutional amendment or statute that redistributes power or wealth faces at best a steep uphill climb, rather than level ground. These circumstances speak to the moral legitimacy of the Constitution, at least for substantial numbers of persons in crucial respects.

We can use the idea of "path dependence" to refer to part of the

IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995).

68. See U.S. CONST. art. V.

69. See *supra* notes 12-18 and accompanying text.

70. Richard S. Kay, "Originalist" Values and Constitutional Interpretation, 19 HARV. J.L. & PUB. POL'Y 335, 337 (1996).

71. *Id.* Consider also the continuing tide of popular biographies of the various Founders and Framers.

problem with Professor Bork's argument. In a non-technical sense, the idea of path dependence recognizes that while, say, each coin toss in a series may be independent of the others, our political and legal future may, in contrast, be crucially limited if not realistically dictated by previous political and legal decisions of varying degrees of justice.⁷² The familiar judicial doctrine of stare decisis or respect for precedent⁷³ is only one element of this process.

From the perspective of those disadvantaged at the time of drafting the Constitution, even their later enfranchisement does not mean that they are now restored or "back on track," in the sense of being as well positioned in substantive constitutional rights and influence as they would have been had they been allowed to appropriately influence the constitutional process from the beginning. Some of the effects of the original exclusions can to a degree become "locked in."⁷⁴ The scope of rights recognized today and tomorrow may well indirectly reflect in traceable and untraceable ways past procedural and substantive exclusions. To put the matter another way, "what might do best today could have been selected out for extinction in the past."⁷⁵ Justice today may have been precluded by the continuing, if always shifting, influences of decisions and power relationships as they existed in the past.

Can we still hear today any echoes in our constitutional law of the original systematic exclusion of particular groups? Below, we will

72. For discussion of the various uses of the term "path dependence" in the social sciences, see Stephen E. Margolis & S.J. Liebowitz, *Path Dependence*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 17-22 (1998); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 251 (2000) (With a path dependent phenomenon, "particular courses of action, once introduced, can be virtually impossible to reverse."). For a brief survey of some interesting purported applications, see Stan Liebowitz & Stephen E. Margolis, *Policy and Path Dependence: From QWERTY to Windows* 95, 18 REGULATION, Summer 1995, at 33, available at <http://www.cato.org/pubs/regulation/reg18n3d.html>. See also S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J.L. ECON. & ORG. 205 (1995); James Mahoney, *Path Dependence in Historical Sociology*, 29 THEORY & SOC'Y 507 (2000).

73. For discussion, see, for example, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992) (O'Connor, J., for the plurality); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

74. See Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001) ("[C]ourts' early resolutions of legal issues can become locked-in and resistant to change.").

75. Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 641 (1996).

briefly consider as an example the Supreme Court's judicial treatment of a claim to any sort of constitutional right to minimal housing.⁷⁶ In a time in which some advocates on all points of the political spectrum advocate for one right or another not expressly referred to in the constitutional text,⁷⁷ there has been surprisingly little interest in endorsing the idea of even minimal economic constitutional rights for the poor and disadvantaged. It is often at just such economic or survival claims that a theorist draws the line between his or her own political preferences and what the theorist is also willing to claim that the Constitution requires. It is sometimes claimed that for many non-originalists, there is a remarkable correspondence between their own independent policy preferences and what they take the Constitution to require.⁷⁸ In response, a number of non-originalist theorists have pointed to important differences between their own policy preferences and what the Constitution can reasonably be said to mandate.

Thus, Professors Laurence Tribe and Michael Dorf, for example, write that "[i]f we were writing a Constitution . . . , we might well favor . . . a constitutional provision setting a ceiling on the intergenerational transmission of wealth But . . . it is quite impossible to read *our* Constitution as including [such a provision]."⁷⁹ Professor Cass Sunstein similarly endorses President Franklin Delano Roosevelt's vision of economic security or basic welfare rights as a matter of a vital public commitment, but specifically not as a matter of a judicially enforceable constitutional right.⁸⁰

Most elaborately, consider the distinction drawn by Professor Ronald Dworkin:

If I were trying to answer the question of what equal

76. See *infra* Part VII.

77. See, e.g., the rights of privacy, intimacy, or autonomy recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), or the various liberty rights referred to in *Meyer v. Nebraska*, 262 U.S. 390 (1923).

78. See, e.g., BeVier, *supra* note 7, at 287–91.

79. LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 16 (1991).

80. See Cass R. Sunstein & Randy E. Barnett, *Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue*, 53 DRAKE L. REV. 205, 215 (2005). For Professor Sunstein's positive or historical account of related matters, see Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 23–24 (2005) (noting also that the two most recent Democratic nominees to the Supreme Court, Justices Breyer and Ginsburg, "seem uninterested in aggressive judicial protection of social and economic guarantees").

citizenship means as a philosophical exercise, . . . I would insist that citizens are not treated as equals by their political community unless that community guarantees them at least a decent minimum standard of housing, nutrition and medical care. But if the Supreme Court were suddenly to adopt that view, and to announce that states have a constitutional duty to provide universal health care, it would have made a legal mistake, because it would be attempting to graft into our constitutional system something that (in my view) doesn't fit at all.⁸¹

Each of these theorists thus sets aside even the most vital and least costly claims to economic provision from the realm of enforceable constitutional law. This line is drawn regardless of any consideration of fault, desperation, public affordability, and ease or difficulty of eligibility determination and enforcement. We know that this exclusion of any economic subsistence element from the Constitution, including the later-adopted Civil War amendments, is in some sense personally undesired by the theorists cited above. We can responsibly speculate, however, that many of those persons who were excluded from direct influence on the Founders' Constitution, or on the Civil War amendments, would have been sympathetic to some culturally appropriate minimal floor of economic provision as a matter of last resort.⁸²

Today's leading non-originalists would no doubt uphold the equal protection interests of groups such as of women, even though women were not generally enfranchised when the equal protection language of the Fourteenth Amendment was being drafted and adopted.⁸³ Economic or survival rights are another matter. But those who are reluctant to read the Constitution to include minimal economic rights today might well hold otherwise if all the originally systematically

81. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249, 1254 (1997); see also RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 36 (1996) (rejecting "a degree of economic equality as a constitutional right"); Raoul Berger, *Ronald Dworkin's The Moral Reading of the Constitution: A Critique*, 72 *IND. L.J.* 1099, 1109 (1997) (recognizing the above limitation).

82. We might begin the backward extrapolation from the historical and chronological data available in the materials referred to *supra* notes 60–63. By analogy, consider the scope and limits of the "fruit of the poisonous tree" doctrine that often excludes evidence based on causally related "tainted" police activity at an earlier time. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 591–92 (2006).

83. See U.S. CONST. amend. XIX (adopted 1920).

excluded groups had exercised fair initial influence on the constitutional text and case law. The constitutional text and case law that the influence of excluded groups might have generated could well have tipped the balance toward a Constitution interpreted to protect at least some minimal economic subsistence rights.⁸⁴

V. LEGITIMACY, CONTINUING EFFECTS OF PAST INJUSTICE, AND INTERPRETING THE CONSTITUTION

How, then, does the drafting, ratification, and adjudicated history of the Constitution, given the group exclusions we have noted, affect the claims to universally morally binding authority and legitimacy of the Constitution? In particular, we will want to consider whether methods of interpreting the Constitution and adjudicating constitutional cases make a significant difference on matters of moral legitimacy. Our focus will be on whether constitutional originalism compounds the problems of legitimacy, where some alternative approach to constitutional interpretation tends to mitigate such problems.

It is important to recognize, to begin with, that there is a vital difference between the sociological legitimacy of the Constitution⁸⁵ and the moral or morally binding legitimacy of the Constitution.⁸⁶ These two senses are not entirely separate, in that a Constitution that is unknown or universally ignored, and thus sociologically illegitimate, is likely to not be genuinely morally binding as well. But we will argue that a Constitution can be legitimate in the former sociological sense yet not legitimate in the latter, and for our purposes more important, moral sense.

Let us merely assume that the current Constitution, in itself⁸⁷ and as authoritatively interpreted, carries the former sort of sociological or behavioral compliance legitimacy. Thus, rightly or wrongly, most legal

84. For an intriguing take on the purported absence of economic subsistence rights from the Constitution, see Robin West, *Constitutional Fidelity and Democratic Legitimacy* (July 2007), available at <http://www.acslaw.org/files/Robin%20West%20Vanderbilt%20Paper%207-2007.pdf>. Classically, see Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659.

85. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1789–90 (2005).

86. See *id.*

87. For a sense of how this might operate, see *supra* notes 12–18 and accompanying text. For a classic source emphasizing legitimacy in the sociological compliance sense, see Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69 (1959). For further social science investigation of related issues, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

actors and ordinary citizens take the Constitution to be legitimate, authoritative, and binding, on the basis of anything from unthinking acceptance to prolonged reflection. It is accordingly said to be a “legal tradition in the United States”⁸⁸ that “government officials and citizens are obligated to abide by the regime of legal rules that govern their conduct.”⁸⁹ If it is a slight overstatement to say that “this nation has always treated the Constitution as law,”⁹⁰ opposition to the Constitution itself, as distinct from particular interpretations thereof, receded in the period after 1800 and again after the Civil War.⁹¹

If we move the focus to moral, rather than sociological or compliance, legitimacy, we begin to step beyond purely empirical claims. Consider, for example, the still largely sociological claim that “the drafting, ratification, and amendment of the 1787–89 Constitution continue to be seen as events that express the will of a properly empowered American ‘people’ to set and define the character and limits of the polity.”⁹² This may, we assume, be descriptively accurate. But the popular beliefs referred to may or may not be normatively well-justified. Persons may be more or less mistaken in believing in the moral legitimacy of a constitutional regime.

For originalists, the legitimacy of the constitutional founding process and the resulting constitutional text are crucial to their claims.⁹³ Thus Professor Bork argues that “only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy. Only that approach is consonant with the design of the American Republic.”⁹⁴

Now, there may well be a sociological sense in which the original Constitution, as amended and as interpreted in some originalist way, is commonly treated as legitimate. But if we are to take originalism as properly interpreting a genuinely morally binding Constitution, some persuasive argument must be offered. And it is not obvious why a

88. Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DEPAUL L. REV. 469, 469 (2007).

89. *Id.*

90. BORK, *supra* note 2, at 174.

91. *See* Dahl, *supra* note 40, at 2.

92. Kay, *supra* note 70, at 337; *see also* Leib, *supra* note 10 (“Many people would have no trouble with originalist mechanics because they take for granted that the document is binding.”).

93. *See* BeVier, *supra* note 7, at 286 (“Originalists tend to ground their arguments primarily on a foundation of legitimacy.”).

94. BORK, *supra* note 2, at 143.

constitutional ratification process that was deliberately so remarkably narrow in demographic and class terms⁹⁵ should be thought of today as “democratic.”⁹⁶

Despite any sociological legitimacy of the original Constitution, the question of the moral legitimacy of that Constitution remains. It would be morally irresponsible for any conscientious citizen, including those who decide constitutional issues, to casually assume the universal moral bindingness of the Constitution. We need not endorse the mainstream current school of thought, known as “philosophical anarchism,” that denies a general moral obligation to obey the law simply as law.⁹⁷ It may be that some constitutions and laws are legitimate and morally binding, even universally, but that others are not. The question is one of where our own Constitution falls. To the extent that our Constitution has been or remains tainted by any illegitimacy, originalist methods that validate such illegitimacy are equally morally objectionable.

We have throughout our discussion above noticed the undemocratic exclusions from constitutional influence,⁹⁸ and their general continuing influence.⁹⁹ These considerations form much of the foundation of a critique of originalism, but the argument can certainly be more fully developed on both sides. It is thus sometimes suggested that originalism allows the constitutional judge some perspective, some independent criteria, or some distancing from his or her own ideological preconceptions. Originalism is thus said to provide “ground to debate hard questions at some remove from our personal political and moral

95. See *supra* notes 42–47 and accompanying text.

96. BORK, *supra* note 2, at 143.

97. For sophisticated work along these lines, see HEIDI M. HURD, *MORAL COMBAT* 62–94 (1999); A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 192–95 (1979); ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* (1970); David Lyons, *Moral Judgment, Historical Reality, and Civil Disobedience*, 27 *PHIL. & PUB. AFF.* 31 (1998); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 *YALE L.J.* 950, 951–52 (1973). For commentary, see R. GEORGE WRIGHT, *LEGAL AND POLITICAL OBLIGATION: CLASSIC AND CONTEMPORARY TEXTS AND COMMENTARY* 275–81 (1992).

98. See *supra* Part III. It should be noted that in referring to the various constitutional exclusions as undemocratic, unjust, or morally unjustified, we do not mean to judge the Framers in their time and place, or to compare the constitutional franchise with the franchise in other late eighteenth century governments. Instead, it is we, including today's originalists, who must decide whether the broad constitutional exclusions are morally objectionable, in the sense of relevantly “tainting” the fairness and legitimacy of the constitutional adoption and subsequent history, including case law development. What was politically viable or realistic two hundred years ago is relevant only insofar as it may bear upon what we now take fair inclusion to require.

99. See *supra* Part IV.

preferences.”¹⁰⁰ More ambitiously, it is claimed that “in principle the textualist-originalist approach supplies an objective basis for judgment that does not merely reflect the judge’s own ideological stance.”¹⁰¹

We shall briefly address some potential limits on non-originalist decision making below.¹⁰² More directly relevant, we can concede that in at least some respects, the original Constitution provides sufficiently unambiguous language to give the originalist useful guidance.¹⁰³ For our purposes, the major problem is not the ambiguities of the Constitution, but almost the opposite. It is entirely clear that the drafting and ratification was essentially unaffected by major economic and demographic groups whose rights were nonetheless thereby determined.

This is a matter of crucially skewed exclusions rather than of exclusions skewed on some merely insignificant basis. If the process had begun with broad inclusiveness, then excluding even eighty percent¹⁰⁴ of that broad group, with the exclusions being made randomly, would not have been as morally objectionable as the actual process. Even systematic exclusions would not have been so bad if those exclusions had been made along lines that do not track significant political and economic interests and divisions.

Thus systematically excluding, say, all those born before 6:00 p.m. on any given day, however objectionable for other reasons, would not have reinforced and worsened a major political or economic conflict. The interests of those born before and after 6:00 p.m. tend to be parallel. The interests of slave owners and enslaved, property owners and propertyless, free whites and free blacks, and such may overlap in varying respects. But such a congruence of interests cannot be counted on in all important contexts. History records few expressions by white males to the effect that they need not be allowed to vote, as long as the vote of free black males exists to speak for them and uphold their shared interests.¹⁰⁵

100. Leib, *supra* note 10.

101. McConnell, *supra* note 54, at 2415 (emphasis omitted).

102. See *infra* Part VII.

103. Thus we set aside ambiguities associated with terms such as commerce, due process, privileges and immunities, the freedom of speech, cruel and unusual punishment, the Ninth Amendment, and the equal protection of the laws. For some relatively early interpretations, see STORY, *supra* note 66, at 134–62. For some complications, see AMAR, *supra* note 64; AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 231–83 (1998).

104. See *supra* note 42 and accompanying text.

105. Those actually enfranchised might argue that those left disenfranchised would tend to vote redundantly or else irresponsibly. See *supra* note 50 and accompanying text. But

The problem, in a nutshell, is not that the Constitution offers no determinate guidance to a judge beyond the judge's own moral and legal reflections. The main problem is instead that, in certain important contexts, to ground one's decision in the constitutional text and subsequent history is to ground one's decision in evident fundamental unfairness, carried forward in a path-dependent way.¹⁰⁶ Consider a simple analogy. The value of a road sign is not in its longevity or its publicness and visibility alone. A familiar road sign that we can see as pointing in the wrong direction should not be followed. In our key contexts, originalism asks us to follow road signs pointing in an acknowledged wrong direction.

Some have argued that the Constitution should generally be followed because enactment of the Constitution required "supermajorities," and the need to obtain a supermajority for various reasons tends to lead to better textual outcomes or better consequences than does pure majoritarianism, whether among voters or among Supreme Court Justices.¹⁰⁷ But constitutional supermajoritarianism should be placed in the context of the estimate that perhaps 2.5% of the population voted in favor of ratification.¹⁰⁸ Even so, we can stipulate to the general logic of supermajority requirements producing better results, even for permanent minorities.¹⁰⁹ The problem, in our context, begins with the crucial systematic exclusion from the electorate of various important demographics and classes.¹¹⁰

Professors McGinnis and Rappaport, the primary exponents of constitutional supermajoritarianism as yielding better consequences over time, recognize that, in their words, "the desirability of supermajority rules requires that all interests be reflected in the electorate."¹¹¹ They recognize that the exclusion of African-Americans in particular, among other groups,¹¹² was a violation of this

there is a problem of suppressed symmetry at work here. We can imagine that enslaved persons, free blacks, and propertyless whites might, if given the chance, have argued in contrast that the votes of the privileged classes would tend, disproportionately, to be morally irresponsible on key issues.

106. See *supra* notes 72–75 and accompanying text.

107. See John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 385–87 (2007).

108. See *supra* note 42.

109. See McGinnis & Rappaport, *supra* note 107, at 385–88.

110. See, e.g., Henkin, *supra* note 41, at 263.

111. McGinnis & Rappaport, *supra* note 107, at 395.

112. See *id.* at 394–95.

requirement,¹¹³ and may well have rendered the Constitution as a whole non-binding on African-Americans.¹¹⁴

At this point, Professors McGinnis and Rappaport respond, ambiguously, that “these defects in the Constitution have been corrected”¹¹⁵ through the Civil War Amendments and the 1965 Voting Rights Act.¹¹⁶ They recognize possible complications.¹¹⁷ But with these and analogous constitutional amendments in place, the defects of the founding process are thought to have been thereby “eliminated.”¹¹⁸ This, however, will not do.

Let us consider an analogy. Suppose an open bottle of wine had been tipped over for a time, with wine slowly spilling out of the bottle until, some time ago, the bottle was righted, ending further spilling. Whether we want to say that righting the bottle, even some time ago, has “corrected”¹¹⁹ the problem depends on what we take the problem to be. Righting the bottle, and leaving it upright for years, does not clean up the mess. It does not restore the initial conditions, or the conditions of a continuously upright bottle. The staining effect of the spilled wine remains.

Or to sharpen the issues of fairness and alternative histories a bit, consider possible sports analogies. A golfer who is forced to tee off an hour after an opponent may not be at any real disadvantage if both must simply play the same course under no time constraint. Even a later starting marathoner may be at no real disadvantage if given credit for the late start. But a two-hour delay where the goal is to catch more bass by the shared deadline of noon is, in contrast, a severe handicap. Letting the delayed competitor merely do some fishing, with a two-hour handicap, leads to a different history and perhaps a different outcome than otherwise would have occurred.

A closer, if both fanciful and invidious, analogy could involve two marathoners, where one marathoner, from the very start of the race, is required to run with ropes tied about the ankles. At roughly the midpoint of the race, it is decided that fairness and equality require that the thus-bound runner be freed, and the bound runner’s ropes are at

113. *See id.* at 395.

114. *See id.*

115. *Id.*

116. *Id.*

117. *See, e.g., id.* at 396 n.55.

118. *Id.* at 395.

119. *See supra* text accompanying note 116.

that point removed. After a substantial period of attempting to run in the ropes, the runner's form and efficiency suffer, naturally, for a time. And the runner in question is, due to the handicap of the ropes for half the race, well behind.

Should we be willing to say that removing the ropes halfway through the race has "corrected" the problem? Perhaps the effects dissipate only gradually over time, if at all. Does the history of the race while the ropes were in place quickly dissipate, or does that history radiate forward? Does what has unfairly happened not threaten to in various ways significantly affect what will happen, even long after the bonds are loosed?

In the constitutional context, we may today have well-established skeptical thoughts about, say, any federal constitutional right to minimal shelter. Certainly, no such minimal federal constitutional right has been recognized.¹²⁰ Many of us may feel quite certain about the matter. But if the enslaved, free blacks, women, and the propertyless and near-propertyless had been allowed a free and equal opportunity to fairly negotiate and vote on the text of the original Constitution, and to exercise ordinary political influence indirectly affecting how the Constitution is read today, constitutional common sense today might well be different. Such an alternative history of the Constitution, and of its later originalist jurisprudence,¹²¹ might differ in areas affecting the survival interests of the descendants of those originally excluded from influence.¹²²

None of this is to suggest that federal constitutional survival rights, as they might earlier have been envisioned by their supporters and perhaps reluctantly agreed to by others, for the sake of ratifying the Constitution as a whole, would have been akin to twenty-first century welfare state programs. Instead, the minimal survival rights language appropriate for the late eighteenth century could have come from a variety of classic and contemporary sources.¹²³ Such ideas seem marginal

120. See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

121. It is certainly possible that if our constitutional drafting and ratification had been much more inclusive, originalism as a normative theory would be even more popular across the political spectrum, even with its need for supplementation remaining.

122. We may fairly assume that some original provision for minimal survival rights could have been agreed to, even by supermajority, if the rights were sufficiently minimal and thus not so expensive as to significantly reduce overall welfare, and many of those sympathetic to such rights made their approval of the Constitution contingent upon some such provision.

123. For rationales for variously enforceable basic welfare rights, one might cite THOMAS AQUINAS, *THE SUMMA THEOLOGICA OF ST. THOMAS AQUINAS II-II*, question 66, art. 7 (Fathers of the English Dominican Province trans., 2d rev. ed. 1920); CONDORCET,

in the context of the Framers only because we, like the Framers, assume away nearly all those persons whose interests would place a relatively high priority on such rights.

The idea of enforceable welfare rights was not unknown or anachronistic at the end of the eighteenth century. It was, however, relatively important mainly to those excluded from the constitutional process.¹²⁴ Minimal welfare rights could realistically have been adopted without undue burdens on the well-off, and without undermining future economic development. So the originalist cannot claim that the only realistic choices for an inclusive electorate in the late eighteenth century would have been either a constitution without any minimal welfare rights, or no new federal constitution at all.¹²⁵

Sketch for a Historical Picture of the Progress of the Human Mind, in SELECTED WRITINGS 209, 279–81 (Keith Michael Baker ed., 1976) (1793); THOMAS PAINE, *Agrarian Justice*, in THE THOMAS PAINE READER 471 (Michael Foot & Isaac Kramnick eds., 1987) (1795). Most significantly, though, see John Locke's reference to the natural obligation, prior to and in political society, to affirmatively and not merely negatively attend to the minimal well-being of others, as in JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 6, at 6 (Gateway 1955) (1690) ("Every one, as he is bound to preserve himself, . . . by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind . . ."). Consider also the Kantian "imperfect" moral duty of promoting the welfare or happiness, given our limited means, of other persons, in light of the pressingness of their needs. See, e.g., H.J. PATON, THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY 172–73 (1948); ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY 208 (1989). More politically, see IMMANUEL KANT, THE METAPHYSICS OF MORALS, 101, 202–03 (Mary Gregor trans., 1996) (1797) ("[T]he government is therefore authorized to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs."). Kant could not be clearer that he is not talking merely about voluntary charity or merely moral obligations; the obligation owed by the well off to their fellow citizens is to be discharged by one form or another of coercive taxation. See *id.* at 101–02. For an earlier discussion, see BENEDICT DE SPINOZA, *The Ethics*, A SPINOZA READER: THE ETHICS AND OTHER WORKS 85, 241 (Edwin Curley trans., 1994) (1677) ("[T]he care of the poor falls upon society as a whole, and concerns only the general advantage.").

124. This is again not to argue that the Constitution would have been substantially different, across the board, if the Constitution's text had been drafted and agreed to by a broader range of society, including but not limited to the historical participants. That might well be, but it is not what we need to claim herein. Perhaps negotiations would have broken down. The more inclusive alternative constitution might have failed supermajority ratification. Our argument goes mainly to the moral illegitimacy of the important demographic and class exclusions and to originalism's reliance on and validation and furtherance of that process.

125. Our argument herein is not that individual state constitutions throughout American history could not have themselves guaranteed a right to minimal welfare or housing. Indeed, states and localities might in some respects have seemed the more natural places to turn in the Founding Era. Our argument is merely that if states did not more or less universally write such guarantees into their own constitutions, a new federal constitution could have been envisioned as a guarantor of last resort. And it is fair to say that the historical track record of

VI. CONSTITUTIONAL DECISION MAKING AS MORAL DECISION MAKING

Originalism in its standard forms is thus vulnerable to the objection that it validates morally defective drafting and ratification arrangements and the ensuing path-dependent legal culture and case law. Broader theories of constitutional legitimacy that emphasize some form of genuine consent or free agreement to be bound by the Constitution are of no help to originalists in this context. We do not validly bind persons to a contract by excluding them from any participation, in the absence of their unequivocal, knowing, and free consent at any point.¹²⁶ Nor can the assumed higher quality of supermajority constitutional ratification¹²⁷ legitimize the systematic group exclusions to which we have referred.

Originalists might gain some ground, however, by supplementing their originalism in the right way. It may not be plausible to argue that the group exclusions eventually paid off for even the excluded groups themselves. Randy Barnett, however, raises the possibility of legitimizing a constitution through determining whether that constitution, interpreted in light of its original meanings,¹²⁸ creates a system of lawmaking¹²⁹ that is “good enough,”¹³⁰ and that allows only for “necessary and proper”¹³¹ lawmaking, and more specifically, for laws that among other things “do not violate the background . . . ‘natural’ rights”¹³² of those persons required to follow the constitution.¹³³

This is promising in a general sense, but it is certainly hard to see the group exclusions as a necessary element of a system of lawmaking that respects the “background . . . ‘natural’ rights” of those excluded.¹³⁴ For the directly affected groups, it would be far easier to argue that the drafting and ratification process, as well as the Constitution itself in

the states in constitutionally guaranteeing such rights has been mixed at best. For a sample of some relatively recent litigation, see R. George Wright, *Homelessness and the Missing Constitutional Dimension of Fraternity*, 42 LOUISVILLE L. REV. (forthcoming 2008).

126. See Barnett, *An Originalist for Nonoriginalists*, *supra* note 5, at 636–37; Henkin, *supra* note 41, at 263; HUME, *supra* note 18; see also R. GEORGE WRIGHT, REASON AND OBLIGATION: A CONTEMPORARY APPROACH TO LAW AND POLITICAL MORALITY 19–35 (1994).

127. See *supra* notes 107–25 and accompanying text.

128. See Barnett, *An Originalism for Nonoriginalists*, *supra* note 5, at 642–43.

129. See *id.*

130. *Id.* at 643.

131. See *id.* at 639, 642.

132. See *id.*

133. See *id.*

134. See *id.* at 639.

crucial respects, along with the rigorous amendment processes,¹³⁵ violated, rather than respected, the assumed natural rights at stake.

The idea of natural rights in general,¹³⁶ as well as the articulation and defense of particular natural rights,¹³⁷ will of course be controversial, as will the theory's application in context. But natural rights theory, whatever weight it attaches to original intent, could be said to be on the right track. In fact, there is a sense in which a much more generalized such approach literally must be on the right track. Let us briefly consider how.

We have seen that a judge ought not be impressed by originalist theories of constitutional interpretation as applied to matters affecting the most basic practical interests of the major excluded groups. But this conclusion prompts further questions. If a judge faces, say, a claim of some minimal welfare rights, to what extent, if any, should the judge give weight to originalist methods, or to established case precedents perhaps based on originalism? Should a judge in such a case take a guess at what a fair and democratic constitutional adoption process could have set in motion, down an alternative historical track? As well, the judge has taken an oath to uphold the actual Constitution,¹³⁸ and not some shadow constitution, or no constitution at all. What weight should an oath be given? How should these and related questions be answered?

In a way, the answer is easy. The judge is faced with a moral decision, in the sense that some possible decisions and rationales may be somehow morally better than others. The judge's decision making is thus within the zone of coverage of the moral. This means, on a common understanding, that the judge's decision must be morally satisfactory, even if not precisely the morally right or best decision. Typically, for the judge, considerations of morality are in a sense ultimate or overriding.¹³⁹ Even some possible exceptions, as when a

135. See *supra* note 67 and accompanying text.

136. See generally H.L.A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175 (1955); RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* (1979).

137. See Hart, *supra* note 136 (discussing a natural equal right to liberty); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 53–61 (2004).

138. See U.S. CONST. art. VI, cl. 3. More specifically, see 5 U.S.C. § 3331 (2000) and 28 U.S.C. § 453 (2000), the net effect of which requires the federal judge to, among other things, "do equal right to the poor and to the rich," 28 U.S.C. § 453.

139. See, e.g., ALAN GEWIRTH, *REASON AND MORALITY* 1 (1978) (moral requirements not overridable in the core sense of the term "morality"); R.M. HARE, *FREEDOM AND*

judge decides that the overall morally best decision must be set aside on, say, religious or aesthetic grounds, may depend upon an unduly narrow idea of morality, or be otherwise publicly unacceptable.¹⁴⁰

Generally, a judge deciding a constitutional case and a legislator deciding a constitutional matter should choose only from among the morally acceptable outcomes and rationales. Morality binds legislators deciding constitutional matters as much as judges. We note this here only because it is sometimes claimed that an advantage of originalism is its superior capacity to justify judicial review.¹⁴¹ We take no position on judicial review, or on the alleged superiority of originalism in this respect. We refer below to judges simply for the sake of convenience. Our logic would apply equally to legislators, Presidents, or anyone else making a constitutional decision.¹⁴²

REASON 168–69 (1963) (a sense in which morality is overriding); Kenneth Einar Himma, *Substance and Method in Conceptual Jurisprudence and Legal Theory*, 88 VA. L. REV. 1119, 1166 n.125 (2002) (citing leading philosopher William K. Frankena, *The Concept of Morality*, 63 J. PHIL. 688 (1966)) (“It is usually thought, as a conceptual matter, that moral obligations override all other obligations.”). Perhaps most pointedly, see D.Z. Phillips, *Do Moral Considerations Override Others?*, 29 PHIL. Q. 247, 247 (1979) (“[O]ne distinguishing mark of moral considerations is that if a person cares for them, he cannot . . . say that they should be overridden by considerations of any other kind.”).

140. Someone might object to water pollution mostly on aesthetic grounds, perhaps, but most, if not all, of what is objected to in such cases can be reasonably taken up under a broad conception of morality.

141. See, e.g., Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL’Y 479, 485 (1996) (“Nothing beats originalism in court, because nothing else is capable of supporting a judicial veto.”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) (non-originalism as incompatible with the logic of judicial review). For a recent defense of judicial review, see LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001). For recent critiques of strong or traditional judicial review, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 249–53 (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154–76 (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

The claim that only originalism can justify judicial review seems doubtful. Originalists may prefer broad popular majority rule today, but they do little to compensate for the suppression of broad majority rule at the time of the founding. Whether the Constitution, as inherited, can be better interpreted, particularly with regard to the rights of unpopular groups, by elected legislators or by more insulated federal judges is open to debate. Again, we need not take sides on these issues herein.

142. Originalist theorists can, certainly, make important contributions to the overall theory of originalism without raising any questions of morality, in the sense of the moral merits or demerits of originalism. See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48, 53–54 (2006) (focusing on a hypothetical reasonable American as of 1788 as the touchstone for interpreting the text of the Constitution even today, but explicitly setting aside the question of any moral defense, legitimacy, or morally

This does not mean that there will always be some single objectively¹⁴³ best and clearly evident¹⁴⁴ outcome and rationale in any particular case. Further, judges are not required by morality to pretend that they possess boundless powers of moral imagination, empathy, and calculation.¹⁴⁵ Judges may, where appropriate, rely on simple moral rules.¹⁴⁶ As well, the idea of morality itself is neutral as among emphasizing moral rules, consequences, or virtues and vices.¹⁴⁷ Considerations of natural right,¹⁴⁸ natural law,¹⁴⁹ or something like utility, wealth maximization, or pragmatic payoffs¹⁵⁰ may or may not play a part.

A judge who is properly guided by morality may, at least to some degree, consider not just the judicial oath,¹⁵¹ but the judicial context, including the judge's place in a vertical hierarchy, deference and comity, and the weight of judicial precedent. More broadly, context can be morally relevant, including the more or less legitimate expectations of other persons. Role morality¹⁵² may thus be relevant. Awareness of the judge's own limits, fallibilities, and biases of various sorts,¹⁵³ including what is called confirmation bias,¹⁵⁴ may all play a role in judicial decision

binding authority of the Constitution).

143. For some skeptical arguments regarding aspirations to moral objectivity or moral realism in the constitutional context, see Note, *Original Meaning and Its Limits*, 120 HARV. L. REV. 1279, 1287 (2007).

144. See *id.*

145. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81–82 (1977).

146. See HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002); RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

147. For a concise but authoritative introduction to Kantianism, utilitarianism, and virtue theory, see MARCIA W. BARON ET AL., *THREE METHODS OF ETHICS: A DEBATE* (1997).

148. See BARNETT, *supra* note 137, at 53–86.

149. See, e.g., DAVID BRAYBROOKE, *NATURAL LAW MODERNIZED* (2001); Douglas W. Kmiec, *Natural Law Originalism for the Twenty-First Century—A Principle of Judicial Restraint, Not Invention*, 40 SUFFOLK U. L. REV. 383, 400–01 (2007); Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 FORDHAM L. REV. 2087 (2001).

150. See, e.g., RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 57–96 (2003).

151. See *supra* note 138 and accompanying text.

152. See, e.g., Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853 (1992).

153. See, e.g., Scalia, *supra* note 141, at 863 (“It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are ‘fundamental to our society.’”).

154. For a concise summary, see Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998) (on the

making.

None of this, of course, is very specific or definitive, because, by itself, the idea of morality as overriding leaves open many possibilities. While judges deciding constitutional cases are bound by morality's requirements, this does not make judicial decision making, as a species of the former, any easier. Morality in general does not tell us how to specifically apply itself.¹⁵⁵

A requirement of thinking in terms of following the dictates of morality, however, is not without real practical value in our context. Consider a judge who is asked to decide some question of a possible constitutional right to, let us say, some minimal shelter, sufficient to sustain life otherwise vulnerable to the elements. Now, we need not attempt to answer this constitutional and moral question.¹⁵⁶ Nor need we settle upon some specific method of reaching a morally defensible result in such a case.¹⁵⁷ Our focus is instead more modestly on originalism and on fundamental fairness. We need only ask about the degree, if any, to which a judge should, in order to reach a morally sound result and rationale in such a minimal shelter case, rely on any originalist theory.

Whatever the virtues of originalism elsewhere, originalism seems poorly adapted to generate a morally defensible result and rationale in this minimal shelter case and any similar cases. Relying on originalism in this context, given our constitutional history, would ratify the morally indefensible group exclusions and their later effects to which we have referred throughout. Consider Professor Randy Barnett's question: "[W]hat about the majority of inhabitants who were not permitted to vote for any [Constitutional Convention] delegate?"¹⁵⁸ Professor Barnett observes that "[t]hough voting requirements varied with local jurisdictions, in no place could women, children, indentured servants, or slaves vote. Moreover, it was not uncommon to have a property requirement that limited the voting rights of white males and free black

"seeking or interpreting of evidence in ways that are partial to existing beliefs").

155. See *supra* notes 153–54 and accompanying text; see also Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1102–03 (1989) (noting the uncertainties of method and result in modern moral philosophy); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 39–40 (Amy Gutmann ed., 1997).

156. For discussion, see Wright, *supra* note 125.

157. See *supra* notes 147–50 and accompanying text.

158. BARNETT, *supra* note 137, at 20.

males.”¹⁵⁹

If we quite reasonably assume that the excluded groups would tend, out of sympathy if not direct interest, to care somewhat more about shelter and survival than would those with established property interests, originalism would lead us off in a morally unjustified direction in deciding such a case. In this sort of case, originalism validates and extends the practical effects of what even originalists recognize as indefensible on any plausible moral theory.¹⁶⁰ In our contexts, originalism relies on what virtually any mainstream moral theory would recognize as fundamental unfairness, worked forward over time.

Can an originalist make progress, though, by compromising originalism? Justice Scalia, for one, has referred to himself as only a “faint-hearted”¹⁶¹ originalist. The problem in Justice Scalia’s case, however, is that his departures from originalism do not match up well with the problem of fundamental unfairness we have outlined above. Justice Scalia seems willing to depart from originalism if solidly entrenched case-precedent, and thus *stare decisis*, stand in the way of an originalist result,¹⁶² or if circumstances have changed so that an originalist result would be plainly impractical or unrealistic.¹⁶³

But the problem in our fundamental unfairness cases, and in the minimal shelter right context in particular, is not one of a choice between originalism and any entrenched pro-housing right case precedent. Unsurprisingly, the most widely cited case in that general context, *Lindsey v. Normet*,¹⁶⁴ apparently rejects any such constitutional right claim.¹⁶⁵ And the *Lindsey* case itself shows that in the modern era, Justice Scalia need not concern himself with whether denying minimal shelter rights at the constitutional level is somehow unrealistic or simply

159. *Id.*

160. It is of course technically possible to try to defend the major group exclusions on grounds of natural right, natural law, pragmatism, Kantianism, utilitarianism, virtue theory, or any other approach to morality. But the originalist would have to show that such exclusions, and their consequences for law and culture carried forward in some path-dependent way, deserve to be defended on the moral merits. Yet the anti-democratic nature, basic inequality, and fundamental unfairness of doing so pose substantial obstacles to such an attempt.

161. Scalia, *supra* note 141, at 861–64.

162. *See id.*

163. *See id.* For further discussion, see Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1755 & n.42 (2007).

164. 405 U.S. 56, 74 (1972).

165. *See id.* at 74.

impractical.¹⁶⁶

The more basic problem for compromise versions of originalism is that to be moved by considerations of fundamental unfairness in the constitutional adoption process does more than merely supplement, or even create an exception from, constitutional originalism. This is because a broad and central departure from fundamental fairness is inescapably central to originalism. The fundamentally unfair group exclusion problem does not merely call for compromise with originalism, but crucially undermines the moral logic of originalism.

There are admittedly many areas of constitutional law where the original exclusions either were not originally significant, beyond the inherent and profound group insult, or where later developments may well have dissipated any initial adverse effects, as far as we can tell. The Constitution has from the beginning, for example, prohibited the granting of titles of nobility.¹⁶⁷ On the assumptions immediately above,¹⁶⁸ there is no further direct moral harm in interpreting this and similar constitutional provisions through some form of originalism.

Our argument is thus not that originalism too often merely reaches a legally or morally objectionable result, or that the method of originalism is indeterminate or subjective and open to manipulation. Instead, we have argued that especially in matters of basic practical interest to those historically excluded from the ratification process, the exclusions amounted to fundamental unfairness. This procedural¹⁶⁹ unfairness typically continues to radiate in some fashion across time, even with the adoption of the Civil War and other amendments. Originalism in such crucial cases thus validates, relies on, and is inseparable from fundamental unfairness.

166. See *supra* note 163 and accompanying text.

167. U.S. CONST. art. I, § 9, cl. 8.

168. It might be possible to tell a story about how the excluded groups might actually have benefited from a protective sense of noblesse-oblige felt by American nobles. For the sake of the argument, we assume instead that few if any members of the excluded groups would have been elevated to the nobility themselves, or would otherwise have benefited from a hereditary aristocracy.

169. We have emphasized the procedural injustice in excluding a number of significant groups from the creation of the Constitution and of constitutional law. Originalism, in relying on this procedural injustice, is thus procedurally undemocratic. It is thus misleading to suggest that originalism relies on fair representation and majority rule, and is thus procedurally democratic, while also being substantively undemocratic, or undemocratic in some more advanced sense. This unnecessary concession is made in Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3, 5 (1992).

VII. CONCLUSION

With originalism largely disqualified on moral grounds, we are initially left with the vague requirement that constitutional decision makers must reach some morally permissible outcome in some morally permissible way.¹⁷⁰ The question of which of the various alternatives to originalism, alone or in combination,¹⁷¹ best meets this underlying moral requirement is well beyond our scope. Our focus has been on originalism.

Merely for the sake of suggestion, though, let us briefly consider what we might call a highly idealized offshoot of originalism, as articulated by the early constitutional theorist, Justice Joseph Story. Story wrote that

a constitution of government, founded by the people for themselves and their posterity, and for objects of the most momentous nature, for perpetual union, for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty, necessarily requires, that every interpretation of its powers should have a constant reference to these objects.¹⁷²

This amounts to what we might call a “basic purpose” or purposivism approach to constitutional interpretation. Crucially, though, we should take the references to democracy and justice in a full, modern, inclusive sense. And then we must apply this modernized democratic purposivism to not only federal governmental powers, but to the scope and even the nature of constitutional rights as well. Once we reject the various broad group exclusions at our original founding, however, we clearly have something other than originalism.

Consider, though, this basic purposivism in the context, say, of a claimed minimal right to shelter. The closest the Supreme Court has come to such an issue is, again, the case of *Lindsey v. Normet*,¹⁷³ addressing the merits of a state’s Forcible Entry and Wrongful Detainer

170. For discussion, see *supra* notes 139–57 and accompanying text.

171. Interdependence among the various major approaches to constitutional interpretation is a continuing theme in R. George Wright, *Dependence and Hierarchy Among Constitutional Theories*, 70 BROOK. L. REV. 141 (2004).

172. STORY, *supra* note 66, at 141.

173. 405 U.S. 56 (1972).

Statute.¹⁷⁴ In rejecting the tenants' assertion that greater than mere rational basis equal protection scrutiny should apply,¹⁷⁵ the Court declared that

[w]e do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality. . . .¹⁷⁶

The Court here seeks to draw a clear distinction between what may be practically important, or even vital, to some, and what is constitutionally protected.¹⁷⁷ The Court apparently views involuntarily homeless persons' deaths from exposure as for constitutional purposes within a broad category of all social and economic ills.¹⁷⁸ General social rudeness, or declining vocabularies, might presumably also count as less acute social ills similarly not subject to constitutional remedy. The Court notes¹⁷⁹ that at some point, lines of constitutional compliance regarding a minimal shelter right would have to be drawn,¹⁸⁰ as would also be true of various sorts of recognized rights.

Most important for our purposes, though, is the Court's failure to consider how constitutional history, including recent constitutional history, might well have been different if the process of drafting and ratifying the Constitution had been more inclusive, fairer, and more democratic.¹⁸¹ We can easily imagine that for the typical constitutional drafter, avoiding having troops quartered in his home during time of

174. See *id.* at 58–60.

175. See *id.* at 73–74.

176. *Id.* at 74. For contemporaneous discussion, see Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 13–14 (1972).

177. See *Lindsey*, 405 U.S. at 73–74.

178. See *id.* at 74.

179. See *id.*

180. Any minimal housing right would generate borderline cases, but homeless persons would, presumably, be typically better off with access to even a borderline facility. It should be noted that the Court does not abandon the idea of, say, implied substantive due process privacy rights because it finds the constitutional borderline in such cases to be shifting or unclear. Compare the contrasting methodologies and results of Justices Scalia and Brennan in *Michael H. v. Gerald D.*, 491 U.S. 110, 113–32, 136–57 (1989).

181. Recall our clarifications *supra* note 98.

peace¹⁸² was indeed a higher realistic priority and more to be provided against than was the risk of involuntary homelessness. We can also easily imagine that many of the systematically excluded groups, including those not meeting property-ownership requirements,¹⁸³ would, if asked, have ranked sheer survival and avoiding homelessness as a higher priority, whether we think of such groups as especially risk averse or not.¹⁸⁴

What precisely the excluded groups would have asked for, or would have had the voting leverage to extract, cannot possibly be known. Nor do we know how the Civil War Amendments might have been phrased or interpreted—still assuming both a ratified Constitution and a Civil War—if the constitutional adoption process had been more democratic.

It is often suggested that the gentle flapping of a butterfly's wings in South America could eventually result in a tornado in the Northern Hemisphere.¹⁸⁵ We need not go so far as to claim that a slight difference in the initial context would by now have led to a dramatically different judicial Constitution. But we should bear in mind that what from our current perspective would have been a minimally fair expansion of the electorate at the Founding would have been far more dramatic than any number of butterfly wing-flappings.

It would be implausible to argue in response that a dramatic expansion of the Founding franchise would have been politically infeasible, and yet that the effects of an expanded franchise on constitutional history would have been only minimal. If a fairly chosen electorate had, perhaps by some miracle, been made eligible, it is difficult to believe that this would have led to no systematic differences in the constitutional argumentation of their and our day.

The excluded groups would, like other groups, have held some range of views, expressing some mixture of public-spiritedness and group

182. As duly enacted into our fundamental law, U.S. CONST. amend. III.

183. See *supra* notes 41–42 and accompanying text.

184. For a discussion of risk aversion, see Sven Ove Hansson, *Risk*, STANFORD ENCYCLOPEDIA OF PHIL., Mar. 2007, <http://plato.stanford.edu/entries/risk>. The philosopher John Rawls seeks to build what actually amounts to risk aversion in basic matters into his original position contractors' reasoning, while denying that they are to think of themselves as risk averse. RAWLS, *supra* note 38, at 137, 176–77.

185. This "butterfly effect" has been described as "sensitive dependence on initial conditions," such that only a slight difference in initial conditions becomes exponentially amplified over even a short period of time, leading to dramatically different futures. The Butterfly Effect, http://www.cmp.caltech.edu/~mcc/chaos_new/Lorenz.html (last visited Mar. 12, 2008) (for a visual display, click the start button).

interest.¹⁸⁶ No group would have been unanimous as to how to promote the group's interests or on their attitudes toward risky personal outcomes over the course of one's life. Few would have imagined what a right to shelter might have involved centuries later, in a rich and technologically advanced society. But basic self-interest and sympathy might well have inspired many among the excluded groups to place some sort of culturally appropriate emergency or last-resort housing right on the agenda for discussion.¹⁸⁷ A similar logic would apply as well to various other potential constitutional rights-claims associated with survival, basic subsistence, basic opportunities, and perhaps to the meaning of privileges and immunities of citizens,¹⁸⁸ the Ninth Amendment,¹⁸⁹ and eventually the Equal Protection Clause.¹⁹⁰ On each of these matters, then, constitutional originalism unfortunately grounds itself, as we have seen, in irredeemable historic illegitimacy.¹⁹¹

186. In this sense conforming to the predicted pattern of the famous Tenth Federalist Paper. See THE FEDERALIST NO. 10 (Alexander Hamilton).

187. This is not to deny any of the differences between real property prices, incomes, the nature of housing, and cultural expectations then and now. Presumably any of the familiar "positive" constitutional rights claims, as to subsistence, education, or healthcare, would have changed importantly in their meaning over two hundred years.

188. See U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

189. See U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

190. See U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

191. The idea of any sort of "positive" constitutional right, apart from a right to appointed criminal counsel, or to more ambitious interpretations of the Equal Protection Clause, may seem unnatural, unfamiliar, and ahistorical today. See, e.g., *DeShaney v. Winnebago County*, 489 U.S. 189, 195–97 (1989); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30–36 (1973) (narrow 5–4 decision). But these are natural responses to our constitutional history in its most directly tainted and fundamentally unfair respects. It is simply not plausible to claim, for example, that the educational spending case of *Rodriguez* could not have been decided 5–4 the other way if our constitutional founding and subsequent history had been much more democratic.

* * *